

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KAREN L. BURNS**

Claimant

VS.

**DILLON COMPANIES, INC.<sup>1</sup>**

Self-Insured Respondent

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Docket No. 1,044,350

**ORDER**

Claimant requests review of the October 26, 2011 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on February 17, 2012, in Wichita, Kansas.

**APPEARANCES**

Scott J. Mann, of Hutchinson, Kansas, appeared for claimant. Edward D. Heath, of Wichita, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found that claimant sustained an 18 percent permanent functional impairment to the right shoulder as a result of claimant's January 2, 2009 right shoulder injury. The ALJ also found claimant's subsequent left shoulder injury resulted from a new and separate intervening accident and was not a natural and probable consequence of the

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<sup>1</sup> The corporate relationship between Jackson Dairy and Dillon Companies is unclear from the record. The pleadings and briefs name Jackson Dairy and Dillon Companies interchangeably as respondent. Claimant also names Sedgwick CMS at the "insurance carrier," however, that is apparently an error since the record seems clear that respondent is self-insured and since Sedgwick CMS is a third party administrator, not an insurance carrier.

right shoulder injury. Accordingly, the ALJ concluded that respondent is not responsible for the medical expenses incurred for the treatment of the left shoulder injury. The ALJ additionally found that there was an underpayment of temporary total disability benefits (TTD) based on the weekly compensation rate and an overpayment of TTD for the period from November 15, 2010 to December 27, 2010.

Claimant contends she is entitled to permanent partial disability benefits based on a 21 percent right shoulder impairment and a 31 percent left shoulder impairment. Claimant maintains the left shoulder injury is a natural and probable consequence of the right shoulder injury.

Respondent argues that claimant's left shoulder injury is solely traceable to a separate, intervening accident, consisting of claimant's lifting of a table at home on July 2, 2009. Respondent contends that claimant's impairment should be limited to 15 percent to the right shoulder based on the rating of Dr. Estivo. Respondent also contends that it is entitled to a credit for temporary total disability benefits paid between February 15, 2010 and December 27, 2010 for 44.86 weeks at a rate of \$355.02 per week.

The issues to be reviewed by the Board are:

(1) Whether claimant's left shoulder injury was a natural and probable consequence of her right shoulder injury or results from a separate, intervening accident;

(2) The nature and extent of claimant's disability; and

(3) Whether TTD was overpaid and, if so, whether respondent is entitled to a credit therefor.

#### **FINDINGS OF FACT**

Claimant was age 51 when she testified at the May 12, 2011 regular hearing. She is right hand dominant. Claimant began working for Jackson's Dairy in July 2008. Jackson's Dairy processes milk and manufactures Turkey Hill Tea. Claimant's job title was vacation relief, which required her to cover the vacations of other employees and perform a variety of jobs.

On January 2, 2009, claimant had been working in "the HTSC two area..."<sup>2</sup> Thereafter, while claimant was on break, someone told her there was product coming out of tank eight. She talked to her supervisor about the situation and he told her to unhook the tank. Claimant ascended a small ladder and unhooked the tank. After the tank was unhooked, product and chemical started pouring out of the top of the tank onto claimant.

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<sup>2</sup> R.H. Trans. at 14.

As she tried to move out of the way she slipped, fell backwards about four feet onto a brick floor, landing on her right arm.<sup>3</sup>

Claimant was taken to the emergency room, where she received treatment for her right arm. Claimant was told that her right arm and right long finger were fractured and that her right shoulder was “messed up.”<sup>4</sup> Claimant’s arm was placed in a cast and her finger was splinted.

Claimant was initially seen in Dr. Jonathan J. Loewen’s office on January 5, 2009 for follow up regarding her January 2, 2009 right upper extremity injuries. Dr. Loewen’s diagnostic impressions at that time were right shoulder pain, a questionable elbow fracture<sup>5</sup>, and a fracture of the proximal second phalanx of the right long finger. On March 5, 2009, claimant underwent surgery on her right shoulder performed by Dr. Loewen, the authorized treating physician for claimant’s right upper extremity injuries. The surgery consisted of an arthroscopy of the right shoulder with debridement of cartilage damage to the glenoid, repair of anterior labral tear, repair of rotator cuff tear, and subacromial decompression.

Claimant experienced persistent stiffness post-surgically.<sup>6</sup> Claimant underwent a second right shoulder surgery on July 14, 2009, also performed by Dr. Loewen, consisting of arthroscopic lysis of adhesions in the glenohumeral joint and subacromial space.

In between the two right shoulder surgeries, claimant developed pain in her left shoulder which began on July 2, 2009, after she lifted and moved a small card table with her left arm. The lifting incident occurred at claimant’s home. Claimant did not have use of her right arm at the time because it was in a sling from the right shoulder injury. Claimant testified that she thought the table weighed about 12 pounds. She grabbed and lifted the table by the edge. Claimant testified that at first she did not notice anything, but 15 minutes later she began experiencing an ache in her left shoulder which worsened thereafter.<sup>7</sup>

Claimant testified it was not necessary for her to pick up the card table and move it, but she wanted it out of the way so she lifted and moved the table herself. Claimant generally had her children or husband do the activities she was unable to perform. She

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<sup>3</sup> *Id.* at 14.

<sup>4</sup> *Id.* at 17.

<sup>5</sup> That is, a question as to whether this was an old fracture or a new one.

<sup>6</sup> R.H. Trans. at 17-18.

<sup>7</sup> *Id.* at 21.

admits that she could have asked her kids or her husband to pick the table up and put it away, or she could have simply left the table where it was.<sup>8</sup>

Claimant testified she reported her left shoulder pain to Dr. Loewen right away, but no treatment was authorized because the doctor was not authorized to treat the left shoulder. On August 19, 2009, Dr. Loewen examined, and began providing treatment for, the left shoulder, but respondent did not consider it part of this claim. Claimant ultimately underwent left shoulder surgery by Dr. Loewen on February 11, 2010, consisting of an arthroscopic rotator cuff and labral repair.

Claimant was released from treatment for the right shoulder by Dr. Loewen on November 15, 2010. Permanent restrictions were imposed. Claimant returned to work for respondent in February 2011. Claimant doesn't recall why she didn't go back to work sooner.<sup>9</sup> Claimant continues to work for respondent, but now operates a forklift.

At respondent's request, claimant was examined by Dr. John Estivo on April 7, 2011. On April 11, 2011, claimant was seen for an impairment evaluation by Dr. Loewen for the left shoulder.

Claimant's current complaints are occasional pain in the back of the right shoulder. Overhead reaching makes the pain in her right shoulder worse. Also, driving for long distances causes pain and numbness in claimant's hands and holding a telephone for very long causes stiffness in her right arm.<sup>10</sup>

Claimant testified her left shoulder is much worse than the right because the left has limited movement. Lifting the left arm and shoulder too high causes burning in the back of the shoulder by the shoulder blade. Claimant had no problems with either shoulder before January 2, 2009.

Dr. Loewen testified that it is more likely than not that claimant would not have injured her left shoulder if she had been able to use both hands normally. Dr. Loewen also testified, however, that claimant's left shoulder injury could have occurred with no prior right shoulder injury, and that it is common for people to tear a rotator cuff when their opposite shoulder is normal.<sup>11</sup>

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<sup>8</sup> Claimant's Depo. at 10.

<sup>9</sup> R.H. Trans. at 28.

<sup>10</sup> *Id.* at 29-30.

<sup>11</sup> Loewen Depo. at 28-29.

Dr. Loewen opined that claimant sustained a 21 percent permanent functional impairment to the right shoulder based on the 4th edition of the *AMA Guides*.<sup>12</sup> Dr. Loewen rated claimant's left shoulder at 31 percent permanent functional impairment.<sup>13</sup>

Dr. Estivo opined that claimant was status post two right shoulder arthroscopies with rotator cuff repair and labral repair and status post left shoulder arthroscopy with rotator cuff repair and labral repair.

Dr. Estivo testified that claimant's specific act of lifting the table with her left arm at her home on July 2, 2009 resulted in the rotator cuff injury to the left shoulder and the need for surgery to the left shoulder.<sup>14</sup> He testified that any treatment for the left shoulder was not related to the January 2, 2009 injury. Dr. Estivo also stated:

The patient's original surgery to her right shoulder was on 03/05/09. She would have been well-aware that she was to be maintaining restrictions with her right arm and of course using common sense, not lifting anything that would be too heavy to lift with one arm. The patient elected on her own to lift a table with her left arm. This then resulted in a rotator cuff tear to the left shoulder, requiring surgery. The injury to the left shoulder was not caused by over-compensation in recovering from the right shoulder surgery.<sup>15</sup>

Dr. Estivo did not recommend restrictions for or rate the left shoulder. He did, however, find a 15 percent permanent functional impairment to the right shoulder (5 percent for loss of range of motion and 10 percent for distal clavicle resection).<sup>16</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

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<sup>12</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

<sup>13</sup> The record contains no evidence regarding the permanent impairment, if any, for the right long finger fracture.

<sup>14</sup> Estivo Depo., Ex. 2 at 5 (Dr. Estivo's Apr. 7, 2011 IME report).

<sup>15</sup> *Id.*, Ex. 2 at 5 (Dr. Estivo's Apr. 7, 2011 IME report).

<sup>16</sup> *Id.*, Ex. 2 at 6 (Dr. Estivo's Apr. 7, 2011 IME report).

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.<sup>17</sup>

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act.<sup>18</sup> In *Jackson*,<sup>19</sup> the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,<sup>20</sup> the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.<sup>21</sup>

### ANALYSIS

The Board is persuaded that the ALJ correctly found claimant's left shoulder injury was not a natural and probable consequence of claimant's right shoulder injury, but instead resulted from a new, separate, and distinct intervening accident.

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<sup>17</sup> *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>18</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007); *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, 995 P.2d 855 (2000).

<sup>19</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>20</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

<sup>21</sup> *Id.* at 263.

Whether a second injury under these circumstances is compensable depends upon the facts.<sup>22</sup> Here, claimant's injuries on January 2, 2009 were limited to the right upper extremity. Although claimant's right arm and right shoulder were immobilized due to her right upper extremity injuries for a period of months following the accident, there is no evidence that claimant developed left shoulder pain as a consequence of overusing her left upper extremity while favoring the right side. Claimant's left shoulder pain did not develop gradually. There is no evidence that claimant experienced left shoulder pain between the January 2, 2009 event and the incident lifting and moving the table on July 2, 2009.

The left shoulder injury, which was caused by claimant's act of lifting and moving the table, was a non-work-related event and took place in claimant's home. Claimant was certainly under no obligation by virtue of her work for respondent to pick up the table. Although Dr. Loewen testified that claimant would not have injured her left shoulder if she had full use of both arms, he admitted that claimant could have injured her left shoulder if the right shoulder was normal. Dr. Loewen also admitted that it is common for people to injure a rotator cuff when the opposite shoulder is normal. Dr. Estivo testified that claimant's left shoulder injury on July 2, 2009 resulted solely from lifting the table and was unrelated to claimant's right shoulder injury.

Dr. Loewen's testimony linking the left shoulder injury to the right shoulder injury seems conjectural in that it assumes claimant would not have injured her left shoulder if her right shoulder had not been injured. Although claimant testified she "probably"<sup>23</sup> would have lifted the table with her dominant right upper extremity if it were uninjured, the Board finds such evidence speculative. If both of claimant's shoulders had been completely normal, claimant could have lifted the table with the left upper extremity, the right upper extremity, or both. In doing so claimant could have torn a rotator cuff in the right shoulder, or the left shoulder, or both.

Dr. Loewen's testimony that claimant could have torn her left rotator cuff even if the right side was uninjured, coupled with Dr. Estivo's testimony, and the rest of the evidence, persuade the Board that the greater weight of the evidence establishes that claimant's left shoulder injury was not a natural and probable consequence of the right shoulder injury, but was the consequence of a distinct trauma-inducing intervening event, new and separate from claimant's right shoulder injury.<sup>24</sup>

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<sup>22</sup> *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P.3d 66 (2010).

<sup>23</sup> Claimant's Depo. at 8.

<sup>24</sup> See *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).

The Board also agrees with the ALJ that the impairment ratings of Dr. Estivo (15 percent to the right shoulder) and Dr. Loewen (21 percent to the right shoulder) should be accorded equal weight. The preponderance of the credible evidence proves that claimant sustained an 18 percent permanent impairment of function to the right shoulder and is entitled to permanent partial disability compensation pursuant to K.S.A. 44-510d based on that impairment.

The ALJ correctly determined there was both a TTD underpayment and a TTD overpayment. TTD was paid by respondent for 102 weeks at the rate of \$355.02 from January 5, 2009 through December 27, 2010, totaling \$36,212.04. The parties stipulated to an average weekly wage of \$660.00, which yields a compensation rate of \$440.02 per week. It not disputed that TTD was underpaid by \$85.00 per week (\$440.02 minus \$355.02 = \$85.00).

However, respondent maintains that claimant's medical treatment for the right shoulder was delayed because of claimant's left shoulder injury and the treatment it necessitated. Respondent contends, relying on Dr. Loewen's testimony, that claimant would "probably" have reached maximum medical improvement (MMI) for the right shoulder "around mid-February" 2010 in the absence of the left shoulder injury.<sup>25</sup> As the ALJ noted, it would require speculation to determine when claimant would have or could have reached MMI for the right shoulder. The undisputed evidence establishes that claimant continued to receive treatment for his right shoulder until Dr. Loewen released claimant at MMI on November 15, 2010. Claimant is entitled to TTD through November 15, 2010.

Respondent did overpay TTD from November 15, 2010 through December 27, 2010 and is accordingly entitled to a credit against the award by reason of the overpayment, pursuant to K.S.A. 44-525(c). However, the Board finds there was an error in the computation of the Award, which is corrected below.

The Board finds as follow:

(1) Claimant's left shoulder injury was not a natural and probable consequence of her January 2, 2009 right shoulder injury. Rather, claimant's left shoulder injury resulted from a new, separate, and distinct trauma which was unrelated to claimant's right shoulder injury.

(2) As a result of the accidental injury on January 2, 2009, claimant sustained an 18 percent permanent partial loss of use of the right shoulder and is entitled to permanent partial disability benefits based on that percentage, pursuant to K.S.A 44-510d.

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<sup>25</sup> Loewen Depo. at 25.



(3) In accord with the above findings the ALJ correctly determined the TTD underpayment and the TTD overpayment in this claim.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 26, 2011, is hereby affirmed, but modified to correct a computation error.

The claimant is entitled to 95.86 weeks of temporary total disability compensation from January 5, 2009 through November 15, 2010, at the rate of \$440.02 per week, totaling \$42,180.32, followed by 23.25 weeks of permanent partial disability compensation, at the rate of \$440.02 per week, in the amount of \$10,230.47 for an 18 percent permanent partial loss of use of the right shoulder, making a total award of \$52,410.79, all of which is due and payable in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Edward D. Heath, Attorney for Self-Insured Respondent  
Bruce E. Moore, Administrative Law Judge